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CONTENTS

	PAGE
NOTICE OF A SERIES OF FREE LECTURES AT THE HARVARD LAW SCHOOL	1
NOTICE OF LECTURES ON "PROBATE LAW AND TRUSTS" ARRANGED BY THE BOSTON BAR ASSOCIATION	2
MAP SHOWING THE PROGRESS OF THE MOVEMENT FOR INTEGRATION OF THE BAR	3
REFERENCES TO RECENT ARTICLES ON DECLARATORY JUDGMENTS	4
CAN THE OFFICE OF SHERIFF BE ABOLISHED BY THE LEGISLATURE AND HIS FUNCTIONS DISTRIBUTED, IN ALL COUNTIES OR IN ANY ONE COUNTY?—A DISCUSSION OF CONSTITUTIONAL LAW	5
TO WHAT EXTENT ARE FORMER ACCOUNTS OPEN IN THE PROBATE COURTS SINCE ST. 1938, CHAP. 154?	7
JUDICIAL NOTICE OF FOREIGN LAW	8
RESIGNATION AND APPRECIATION OF AN ORIGINAL MEMBER OF THE MASSACHUSETTS BAR ASSOCIATION	11
WHEN AND HOW SHOULD THERE BE A NEW EDITION OF THE GENERAL LAWS?	12
A REQUEST FROM THE COUNSEL TO THE SENATE AND TO THE HOUSE FOR SUGGESTIONS	12
DISCUSSION OF THE SUBJECT	13
THE COMMISSION TO INVESTIGATE THE JUVENILE COURT SYSTEM—THE REPORT OF THE "MASSACHUSETTS CHILD COUNCIL" ON JUVENILE DELINQUENCY AND A DISCUSSION OF THE SUGGESTION THAT THE JURISDICTION OF JUVENILE COURTS BE EXTENDED TO COVER "PRE-DELINQUENCY"	15
MORE ABOUT THE FLAG SALUTE—EXTRACTS FROM THE OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT IN *Minersville School District* v. *Gobitis*	18
THE ADMINISTRATION OF THE OATH TO WITNESSES	20
THE GIFT OF JUDGE CARROLL'S LIBRARY TO THE BOSTON COLLEGE LAW SCHOOL	22
RESIGNATION FROM THE BAR—A SUGGESTION AS TO PRACTICE FOR THE COURTS	23
THE GRADUAL CHARACTER OF LEGAL PROGRESS	24
DISCUSSION OF SUGGESTED SERVICE OF PROCESS BY REGISTERED MAIL	26
A SIDE LIGHT ON SAMUEL WARREN, AUTHOR OF "TEN THOUSAND A YEAR", WITH REFERENCE TO NOVELS ABOUT LAW AND LAWYERS	29

THE 15TH REPORT OF THE JUDICIAL COUNCIL WILL APPEAR IN A "PRELIMINARY SUPPLEMENT" EARLY IN JANUARY.

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 60 State St., Boston, Mass.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

Of MASSACHUSETTS LAW QUARTERLY, published quarterly at Boston, Mass., for October 1, 1939.

State of Massachusetts } ss.
County of Suffolk }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Frank W. Grinnell, who, having been duly sworn according to law, deposes and says that he is the Managing Editor of the MASSACHUSETTS LAW QUARTERLY, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are: *Publisher*, Massachusetts Bar Association, 60 State St., Boston, Mass.; *Editor*, Frank W. Grinnell, 60 State St., Boston, Mass.; *Managing Editor*, the same; *Business Manager*, the same.

2. That the owner is: Massachusetts Bar Association—*President*, Joseph Wiggin; *Treasurer*, Horace E. Allen; *Secretary*, Frank W. Grinnell.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: None—There are no bonds, mortgages or other securities.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

5. That the average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the 12 months preceding the date shown above is ..... (This information is required from daily publications only.)

FRANK W. GRINNELL.

Sworn to and subscribed before me this 18th day of September, 1939.

RAYMOND B. ROBERTS, *Notary Public.*

[SEAL] (My commission expires December 12, 1941.)

Entered as Second-Class Matter at the Post Office at Boston.

NOTICE OF FREE LECTURES AT THE HARVARD LAW SCHOOL.

The attention of members is called to a series of public lectures of interest to the bar to be given, under the auspices of the Harvard Law School by members of the faculty, each upon a subject matter in which the speaker is specializing, and directed at significant present day tendencies, current problems and other recent developments. These lectures are not intended as mere summaries or as supplements to the routine instruction of the school. It is hoped that they will have broad interest and value for the legal profession and the public. The lectures are to be delivered in the court room of Langdell Hall, in Cambridge, at 8 P. M., on Wednesday evenings specified in the schedule. There will be no charge for admission and no tickets are required. Members of the Massachusetts Bar Association and their friends are invited to attend.

F. W. GRINNELL, *Secretary,*
60 State Street, Boston.

WEDNESDAY, JANUARY 10, 1940. Professor Hall
"Mistake of Law in Criminal Cases."

WEDNESDAY, JANUARY 17, 1940. Professor Powell
"Some Aspects of American Constitutional Law."

WEDNESDAY, FEBRUARY 7, 1940. Professor McLaughlin
"Federal Governmental Regulations of Business."

WEDNESDAY, FEBRUARY 28, 1940. Professor Chafee
"Unfair Competition."

WEDNESDAY, MARCH 13, 1940. Professor Hart
"Hearings Before Administrative Tribunals."

WEDNESDAY, MARCH 27, 1940. Dean Landis
"Crucial Issues in Administrative Law."

The earlier lectures in the same series were as follows:

Professor Pound—*"The Economic Interpretation and the Law of Torts."*

Professor Simpson—*"A Possible Solution to the Pleading Problem."* (Printed in *Harvard Law Review* for December, 1939.)

Professor Leach—*"A Study in Will and Trust Draftsmanship."*

Professor Griswold—*"Some State and National Boundaries—Illustrated."*

NOTICE OF A SERIES OF LECTURES ON "PROBATE LAW AND TRUSTS".

December 26, 1939.

To All Members of the Bar:

A course of twelve lectures on *Probate Law and Trusts* will be conducted by The Bar Association of the City of Boston starting on Tuesday, January 9, 1940, and continuing on successive Tuesdays to and including March 26th. They will be held at the Boston University Law School Lecture Hall from five to six P. M. There will be a brief question period following the lectures.

The lecturers will be Mr. Guy Newhall and Mr. Mayo A. Shattuck. Mr. Newhall is well known to the bar of this Commonwealth as the author of Settlement of Estates and Fiduciary Law in Massachusetts and other works; Mr. Shattuck has lectured on the law of trusts for many years at the Northeastern University Law School and had charge of the Massachusetts annotations to the Restatement of Trusts; he is also editing the forthcoming edition of the Trustees Handbook.

There will be a charge of $5.50 for the series and admission will be by ticket only. Inasmuch as the seating capacity is limited, the applications will be filled in the order in which they are received. Enclosed is an application blank for tickets which may be obtained from the Secretary, Charles C. Cabot, 50 Federal Street, Boston.

FREDERIC H. CHASE, *President.*

PROBATE LAW AND TRUSTS

The lectures are as follows:

JANUARY 9, 1940: Mr. Newhall—*Miscellaneous Problems Concerning Drafting of Wills.*

JANUARY 16, 1940: Mr. Newhall—*Problems Confronting the Executor After Appointment.*

JANUARY 23, 1940: Mr. Newhall—*Various Problems Involved in a Will Contest Including Compromise and Appeals.*

JANUARY 30, 1940: Mr. Newhall—*Conduct of an Equity Suit in the Probate Court.*

FEBRUARY 6, 1940: Mr. Newhall—*Interstate Problems Including Ancillary Administration and Taxation.*

FEBRUARY 13, 1940: Mr. Newhall—*The Executor's Final Account Including Various Accounting Problems That May Arise.*

FEBRUARY 20, 1940: Mr. Shattuck—*Problems Arising After Trustee Takes Over Property from Executor.*

FEBRUARY 27, 1940: Mr. Shattuck—*Division of Work Between Co-Trustees; Trustees' Power to Delegate; the Rights of Trustees to Employ Expert Advice; Standard of Care to be Exercised by Trustees.*

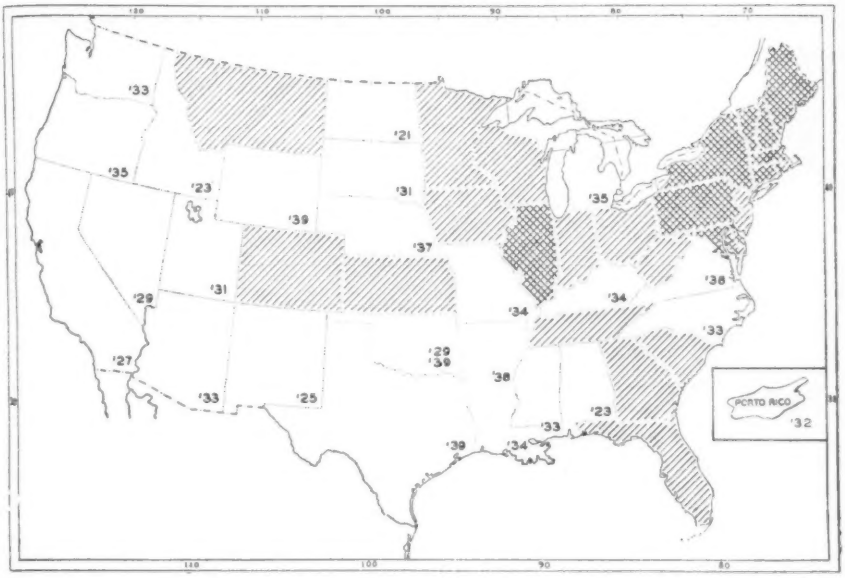
MARCH 5, 1940: Mr. Shattuck—*Discussion of an Important Case Involving the Surcharging of a Trustee.*

MARCH 12, 1940: Mr. Shattuck—*Problems of Amortization of Bond Coupons and Certain Other Allocations as Between Principal and Income Including Trustee's Duties and Powers With Regard to Unproductive Real Estate Contained in the Trust Portfolio.*

MARCH 19, 1940: Mr. Shattuck—*The Living Trust.*

MARCH 26, 1940: Mr. Shattuck—*The Life Insurance Trust.*

Progress of Bar Integration Movement



Integrated Bars.

States in which Bar Asscciations are committed to integration.

States not yet sufficiently advanced to prosecute campaigns.

This map shows the progress of the bar integration movement in recent years with the dates of integration in the various states, beginning with Alabama in 1923. The map is reproduced by permission from the "Journal of the American Judicature Society" for December, 1939, which contains the latest information.

Four states have been added to the list in the past two years—Arkansas and Virginia in 1938 and Texas and Wyoming in 1939, making a total of 23 states and Porto Rico, in which the bar has been organized as a whole either by statute or by rules of court.

The most striking fact shown by the map is the lack of interest in the northeastern states and in Illinois. The "Journal of the American Judicature Society" for December, 1937, contained a comprehensive report on the movement up to that time. An account of the movement, for the information of the Massachusetts bar, was printed in Appendix A of the 13th Report of the Judicial Council as a supplement to the report of the Council made at the request of the legislature on two bills and a resolve relating to the subject in that year.

The Executive Committee of the Massachusetts Bar Association recommended the organization of a self-governing bar by rules of the Supreme Judicial Court, in 1937, and a tentative draft of rules for that purpose was prepared by that committee to be submitted to the various bar associations for discussion when the interest in the subject appears to warrant the expense of printing.

The two objections which appear to be most commonly expressed by lawyers in Massachusetts are: first, a fear that the organization of the bar as a whole would in some way eliminate the local bar associations, and, second, the fear of what is called "regimentation" of the bar by the court, or by the representatives of an organized bar. As to the first objection, the experience in other states, particularly in California and Michigan, shows that the interest in the local bar associations has increased and has been encouraged by the state organization, and those who support the integration movement in Massachusetts expect that the same result would follow and believe it to be important that the local associations should continue. As to the second objection, we see no reason to fear "regimentation" by a "self-governing" bar in which the representatives of the bar from different portions of the commonwealth are chosen by secret ballot. The real problem is—how can the bar best prepare itself to meet its future problems and responsibilities? We believe the question will be answered eventually by the junior bar, and commend the subject to them for study, because they will have to face the problems and responsibilities.

F. W. G.

REFERENCES TO RECENT ARTICLES ON DECLARATORY JUDGMENTS.

In view of the increasing use of declaratory procedure in the Federal Courts and in other jurisdictions, as well as in Massachusetts where it is limited to the interpretation of written instruments, the bar may be interested in the latest news on the subject in articles by Professor Borchard in the *Brooklyn Law Review* for October, and in the *Illinois Law Review* for November, 1939; an article by Mr. Appleman in the *Wisconsin Law Review* for July, and an article in the *Georgetown Law Journal* for October.

Abstracts of some of these articles appear in *Current Legal Thought* for November, 1939.

A large collection of American cases on this subject also appeared some years ago in the Fourth Report of the Michigan Judicial Council.

The notes of Mr. Justice Lummus to Superior Court Rule No. 101 also contain much information.

CAN THE OFFICE OF SHERIFF BE ABOLISHED BY THE LEGISLATURE AND HIS FUNCTIONS DISTRIBUTED, IN ALL COUNTIES OR IN ANY ONE COUNTY?

The recent developments in Suffolk County have resulted in suggestions for changes in the system of county government, particularly in connection with the office of sheriff, and we have been asked to what extent the office of sheriff is subject to the action of the legislature in view of the fact that it was made an elective office in 1855 by the 19th amendment to the constitution. *We discuss the matter as a pure question of constitutional law and express no opinion on the question of policy.*

The 19th amendment to the constitution provided that:

> "The legislature shall prescribe by general law for the election of sheriff, registers of probate, commissioners of insolvency and clerks of the courts, by the people of the several counties, and that district attorneys shall be chosen by the people of the several districts for such term of office as the legislature shall prescribe."

On May 16th, 1856, the legislature provided by Chapter 173 of that year for the election of Commissioners of Insolvency to hold office for three years. By another act passed only three weeks later (St. 1856, Chapter 284), the legislature transferred all the jurisdiction, power and authority of Commissioners of Insolvency to judges of Courts of Insolvency,—thereby first established. The Supreme Judicial Court, in *Dearborn* v. *Ames*, 8 Gray, 1, in an opinion by Chief Justice Shaw, sustained the act which thus put an end to all the powers, jurisdiction and compensation of the commissioners. Chief Justice Shaw said:

> "When the Constitution requires that certain officers, designated by titles, whose duties and powers are either prescribed by statute, or, being common law officers, are defined and limited by the rules of the common law, and who exercise the powers and duties, implied by law from the titles of such officers, shall be appointed or chosen in a particular manner, it is certainly not competent for the legislature to provide that officers, thus designated by the titles of the offices they hold, shall be chosen or appointed in any other way. But if the legislature, under the power vested in them, and judging that some or all of the powers vested by law in one class of officers, designated by these titles, may be more beneficially exercised by another and distinct class of officers, we think it is competent for the legislature to prescribe the mode in which such other class of offices shall be constituted." (*cf. Com.* v. *Intoxicating Liquors*, 110 Mass. 172.)

Thus in 1843, the office of attorney general was abolished and was recreated in 1849. The office of solicitor general, which is specifically referred to in the constitution, Chap. II, §1, Art. 9, was abolished in 1832, although there is nothing to prevent the legislature from again providing for a solicitor general. In other words, the fact that the constitutional amendment provides that certain named offices shall be filled by election, if they continue to exist, does not mean that they must continue to exist. The general powers given to the legislature by the constitution to set forth the powers and duties of officers are not affected by the question whether they are to be appointed or elected. The office of sheriff is not "created or provided for in the constitution" (see *Opinion of the Justices,* 117 Mass. 603 and 240 Mass. 611 and 6, Op. A.G. at p. 373).

An ancient English function of a sheriff was to keep the peace in his county (see Bouvier's "Law Dictionary", *Robinson's case,* 131 Mass. at p. 378). That function, in Suffolk County, today, is largely performed by the Boston Police Commissioner, although some remnant of the peace-keeping functions of a sheriff are found in G. L. Chap. 220, §3, which authorizes the judges and justices of the peace to command the assistance of the sheriff in case of riot, etc. The custody of the county jail is also a remnant of the peace functions; but a close study of the history of the addition, subtraction, modification, variation and distribution of the functions of the office, probably, would disclose the fact that the office, as it exists today, is one of miscellaneous functions, no one of which is distinctive and all of which might be distributed among others, *so far as legislative power is concerned,* if the development of modern life calls for it in the public interest. In other words, modern peace and penal administration does not necessarily centre in the office of county sheriff *as a matter of constitutional law.*

The question of policy is a very different matter and the variety of matters with which a sheriff may have some connection, as shown by the Index to the General Laws, may provide reasons for retaining the office in existence with some functions, even if the details of administration may be improved. Different counties may need different arrangements.

F. W. G.

TO WHAT EXTENT ARE FORMER ACCOUNTS OPEN IN THE PROBATE COURTS SINCE ST. 1938, CHAP. 154?

We have been asked this question by several members of the bar.

This act was passed on the recommendation of the Judicial Council and of the Administrative Committee of the Probate Courts for reasons stated in the 12th Report of the Judicial Council (pp. 47–49) following a report of the Administrative Committee and a memorandum of law prepared by a member of that committee in the MASSACHUSETTS LAW QUARTERLY for April, 1936 (pp. 14–24). An additional memorandum as to the statute appears in the QUARTERLY for April-June, 1938 (p. 33).

We think it clear that since the effective date of St. 1938, Chap. 154, decrees allowing former accounts are no longer open as they formerly were under § 19 of Chap. 206 of the General Laws, but that such decrees stand on the same footing as other decrees under the general inherent power of the court to revoke a decree for fraud or manifest error which is expressly recognized in the act.

§ 19 of said chapter provided that:

> "Upon the settlement of an account, all former accounts of the same accountant which have not been settled according to section twenty-four or corresponding provisions of earlier laws may be so far opened as to correct a mistake or error therein."

This section was expressly repealed by section 2 of St. 1938, Chap. 154. The purpose was to change the rule stated in *Coulson* v. *Seeley*, referred to in the memorandum of April, 1936, above cited.

This section having been repealed, all *statutory* grounds for the opening of a previous account duly allowed, were removed, and the accountant is, therefore, protected by the earlier decrees subject only to the inherent power of the court already referred to and recognized by the new statute. It is not a question of changing the effect of an earlier decree. The change is in the removal of the statutory ground of attack without which the earlier decree is subject, like all other decrees, simply to the inherent power.

The obvious purpose of the statute was to limit proceedings so that something should be considered settled by a formal decree, as in other courts "of superior and general jurisdiction",* after notice and often with written consent expressly approving an account. There are no contractual or vested rights to sleep, for years, on an opportunity to question an account thus approved in the absence of fraud or manifest error. The change in the statute is merely remedial.

F. W. G.

* G. L. c. 215 §2.

JUDICIAL NOTICE OF FOREIGN LAW.

One of the first recommendations adopted by the legislature from the first Report of the Council was a change in the archaic Massachusetts rule as to the method of determining the law of another state or country when the question arises before a court. The act as recommended and adopted (St. 1926, Chap. 168) provides that:

> "The courts shall take judicial notice of the law of any other state or country whenever the same shall be material."

It now appears in G. L. (Ter. Ed.) Chap. 233, § 70.

In its 2nd Report (p. 10), the Council, of which the late Mr. Justice Loring was then the active chairman, said:

> "By the adoption of this act, Massachusetts took a pioneer step which we believe to be in advance of any other English-speaking jurisdiction."

As subsequently stated by Mr. R. G. Dodge, a member of the Council, in an address before the American Bar Association,* the act did away with "the time-honored farce of submitting questions of foreign law to the jury as questions of fact". (Cf. Thayer, "Preliminary Treatise on Evidence," pp. 257–258.)

In view, however, of the fact that some members of the bar seemed to think that the statute shifted the whole burden of the question to the court and relieved them of responsibility to assist the courts, the Judicial Council, in its 7th and 8th Reports, recommended "that the various courts adopt, *for the guidance of the bar*", a rule that:

> "Whenever the law of any jurisdiction outside of Massachusetts shall be material, it shall be the duty of counsel to call to the attention of the court such authorities or other material relating to the question as they wish the court to consider."

There was nothing in the statute about judicial notice to relieve the bar of its function of assisting the courts, and the court, under the statute, can regulate its administrative practice by rule or, as it did in practice under the earlier law, by "presumptions". It may be convenient for the bar to realize that the Supreme Judicial Court has thus developed the practice in a series of opinions since the statute.

In *Hite* v. *Hite* (1938 Adv. Sh. 1631, decided Oct. 25th, 1938), Mr. Justice Ronan said:

> "In the absence of any evidence of the law of a sister state, it is presumed that its common law is the same as that of this Commonwealth. *Demelman* v. *Brazier*, 193 Mass. 588;

* A. B. A. Journal for September, 1926, p. 658.

> *Atlantic Transp. Co. Inc.* v. *Alexander Shipping Co. Inc.* 261 Mass. 1. The petitioner, however, is not seeking to enforce any common law right. The record fails to show that evidence relative to the law of Ohio was presented in the court below. There is, however, a statement in the brief of the respondent 'that in Ohio the widow under the circumstances of this case, takes three-fourths of the decedent's estate and the father one-fourth'. This court is not required to examine and determine the law of another sovereignty unless evidence thereof has been presented by the parties. *Lennon* v. *Cohen,* 264 Mass. 414; *Richards* v. *Richards,* 270 Mass. 113. We are authorized by G. L. (Ter. Ed.) C. 233, § 70, to take judicial notice of the laws of Ohio and in view of the fact that the personalty now in the course of administration must be distributed in accordance with that law, and on account of the aforesaid reference contained in the brief, we think we ought to determine the question, *Walker* v. *Lloyd,* Mass. Adv. Sh. (1936) 1939; *Bradbury* v. *Vermont Railway Inc.,* Mass. Adv. Sh. (1938) 64."

In 1928, in the case of *Lennon* v. *Cohen,* 264 Mass. 414, when the statute was still new, the court quoted the statement, "The law of another state is a fact to be proved, like any other fact, by evidence," citing *Wylie* v. *Cotter,* 170 Mass. 366 and *Electric Welding Co.* v. *Prince,* 200 Mass. 386 at p. 300. The court then stated that, "The statute does not purport to make any change in the nature of the law of a foreign jurisdiction as to its evidenciary or legal substance". Apparently the court had overlooked the fact that the Massachusetts rule, as stated in *Electric Welding Co.* v. *Prince,* which was the most extreme example in the country of what Mr. Dodge referred to as "the time-honored farce", and its results in practice, were the reasons for the passage of the statute.

The unfortunate and peculiar results in practice of the habit of calling a question of law a question of fact, even after the statute of 1926, appeared in the extended discussion in *Richards* v. *Richards,* 170 Mass. 113, where the court suggested that the law of New York should not be considered on demurrer unless it was pleaded.* The court did, however, take judicial notice on the merits. See pp. 119–122. As stated in a memorandum by a learned member of the bar in regard to this opinion:

> "It certainly seems extraordinary that the Supreme Judicial Court should feel free to collate the decisions in the several states respecting imputed negligence—as in *Schultz* v. *Old Colony St. Ry.* 193 Mass. 309—or to analyze for purposes of comparison the New York decisions as to the

* The Connecticut cases of *Woodward's appeal,* 81 Conn. 152 (at p. 164); *American Woolen Co.* v. *Haaget,* 86 Conn. 234 (at p. 243); *Warneke* v. *Prissner,* 105 Conn. 503 (at p. 505) and *Tuttle* v. *Jockmus,* 106 Conn. 683 (at p. 687) show how simply the Connecticut court accepted and applied the idea of judicial notice on demurrer.

> measure of damages for the conversion of stock,—as in *Hall* v. *Paine,* 224 Mass. 62,—and should then feel constrained to declare that in a case in which the law of New York is a real issue, it must assume an attitude of complete ignorance."

Sooner or later, we believe that the courts and the bar will stop referring to a question of law of another jurisdiction as "a question of fact" differing, in this respect, from a question of domestic law. The distinction will not bear analysis. The tradition began in England and in this country when transportation, communication and translation were comparatively limited so that the "sources" of foreign law were not readily accessible.* But today the law of all states and countries is freely discussed in textbooks, law magazines and judicial opinions and is studied by judges in their search for *the sources of domestic law.* It may also often be ascertained by inquiry of consuls.

As James B. Thayer said:

> "Two things seem to be true, (a), that in an exact sense" the questions in the ascertainment of foreign laws "are questions of fact, *and that equally the same questions about domestic laws are questions of fact;* (b) that if the *factum* of domestic law is for the courts, equally, the *factum* of foreign law should be,—assuming it to be true that it is wanted, in order to determine the rule or law of the case. Such law, as well as the domestic law, should be ascertained by the judge. The circumstance that while the domestic law does not need to be proved by evidence, strictly so-called, foreign law must be so proved, is not material. In reason, the judges might well enough be allowed to inform themselves about foreign law in any manner they choose." **

In *Knickerbocker Trust Co.* v. *Iselen,* 185 N. Y. 54 (at p. 58), Judge O'Brien said:

> "It is true that foreign law is ordinarily proved as a fact; still it is not in its essential nature a fact any more than domestic law is a fact."

Thayer's statement that, "The same sort of question is presented whether the law be domestic or foreign," was quoted in the first Report of the Judicial Council (p. 38) as a reason for the new statute.

In the opinions subsequent to that in *Lennon* v. *Cohen* and leading up to that in *Hite* v. *Hite,* the court appears to have been gradually modifying the statement that there is any essential difference between a question of foreign and domestic law except so far as its sources are conveniently available to the court and the bar, and, when they are not so available, the court resorts to "presumption" from necessity.

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* (See explanatory note to the Uniform Act on Judicial Notice in the "Handbook of the National Conference of Commissioners on Uniform State Laws" for 1936, p. 355).

** Thayer "Prelim. Treatise on Evidence" 257–258.

If the animal "looks like a frog, and jumps like a frog, why not call it a frog?"—so, if a question of foreign law looks and jumps like a question of domestic law, why not call it "a question of law", and not "a question of fact", and avoid a great deal of artificial thinking, writing and practice on the subject?

The scope of the judicial notice of the Judicial Committee of the Privy Council covers the laws of such diverse jurisdictions as Quebec, South Africa, Cypress and India.*

The word "Evidence" in connection with "judicial notice" of law, domestic or foreign, is apt to mislead. It is merely a "source of law". Bouvier's "Law Dictionary"** cites Stephen's "Digest of Evidence",*** in which "judicial notice" is explained briefly but fully as follows:

> "No fact of which the court will take judicial notice need be proved by the party alleging its existence; but the judge if he is unacquainted with such fact, may refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference."

Stephen, like Thayer, classes *domestic* law as a "fact" or source of the "rule or law of the case". Professor Thayer said:

> "We may dismiss any notion that legal reasoning is some non-natural process by which the human mind is required to infer what does not logically follow. Expressions that import this are to be regarded as mere phrases for what may be and should be more accurately stated."

The whole of his chapter on "Judicial Notice" deserves reading, and, particularly, the last part of the note beginning with the sentence marked "(b)" on page 280 and the first paragraph on page 308 of the "Preliminary Treatise on Evidence".

F. W. G.

* See *Chowdry* v. *Dibeh*, 3 Knapp 55. ** Rawles Ed. Vol. II, p. 39. *** Art. 59 and see Art. 58.

THE RESIGNATION OF AN ORIGINAL MEMBER OF THE MASSACHUSETTS BAR ASSOCIATION.

The treasurer recently received a letter from a man whose close association with courts since 1909 gave him constant opportunities for observation. He said:

> "With much regret, I feel obliged to resign my membership. I became a member at the time of the meeting for organization [December, 1909] and am glad to have been such during the period while the Association has accomplished so much in the improvement of the administration of the courts."

The treasurer expressed regret and added, "Loyalty such as yours has made the Association possible."

WHEN AND HOW SHOULD THERE BE A NEW EDITION OF THE GENERAL LAWS?

A Request for Suggestions by the Counsel to the Senate and to the House.

TO THE BAR ASSOCIATIONS OF THE COMMONWEALTH:

It appears to the Counsel to the Senate and Counsel to the House of Representatives, in carrying out their duties relative to the General Laws under G. L. 3 secs. 51–55, inclusive, especially under sec. 53 of said G. L. 3, as amended by 1939, 376 sec. 1,* that it would be well at this time to look forward to the publishing of a new edition of the General Laws at some time in the not too distant future.

In connection with the publication thereof several questions of interest to the bench and bar arise, viz.:

(1) As to the time of publication;

(2) As to whether the edition should be a revision of the General Laws and amendments, enacted as a whole like the original General Laws, or a reprint thereof, like the Tercentenary Edition of the General Laws;

(3) As to the nature of the revision, if that form of edition is decided upon; and

(4) As to what, if any, particular chapter or chapters of the General Laws should be the subject of revision, in anticipation of a new edition as aforesaid.

With respect to the time of publication, it should be noted that, in order to have available all the amendments to the General Laws since the Tercentenary Edition of the General Laws, it is necessary to use eight "Blue Books", so called, and that, beginning with 1941 the Blue Books will be published biennially.

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* § 53 of Chap. 3 of the General Laws, relating to the functions of the Counsel to the Senate and the House, was amended by St. 1939, c. 376 to read as follows (the new matter being printed in italics):

"AN ACT RELATIVE TO THE CONTINUOUS AND GRADUAL REVISION OF THE GENERAL LAWS.

Section 53. Said counsel may, from time to time, submit to the general court such proposed changes and corrections in the general statutes as they deem necessary or advisable, including recommendations for the repeal of such statutory provisions as have become obsolete or the reasons for the enactment of which have ceased to exist. If, in their opinion, the necessity of enacting special bills in relation to any particular subject of legislation may, without detriment to the public interest, be avoided in whole or in part by the enactment of general legislation, they shall from time to time submit to the general court drafts of such changes in or additions to the General Laws as will accomplish said purpose. *If and as directed by the committees on rules of the senate and house of representatives, acting concurrently, said counsel shall proceed to revise the General Laws, including amendments thereof, as a whole or chapter by chapter or otherwise; and in the course of such a revision said counsel may recommend the omission of redundant enactments and those which may have ceased to have any effect or influence on existing rights, the rejection of superfluous words, the condensation of all circuitous, tautological and ambiguous phraseology into as concise and comprehensive a form as is consistent with the full and clear expression of the will of the general court, the filling of omissions and the correction of any mistakes, inconsistencies and imperfections which may appear.* They shall advise and assist as to the form of drafts of bills submitted to them in accordance with section thirty-three of chapter thirty.

In considering said questions, the effect of the publication of a new edition of the General Laws on members of the bench and bar who use the "Annotated Laws of Massachusetts" should be taken into account.

Accordingly, any suggestions having any bearing on the subject-matter of the aforesaid questions will be greatly appreciated. The said counsel will be pleased to confer with any committee or other representative appointed by any bar association, or other association or organization of lawyers, to consider any phase of the matter of correcting, revising or reprinting the laws of the commonwealth of general application and to receive recommendations from any such committee or representative.

FERNALD HUTCHINS,
Counsel to the Senate.

HENRY D. WIGGIN,
Counsel to the House of Representatives.

December 22, 1939.

DISCUSSION.

In considering this matter, it should be borne in mind that the last general consolidation and rearrangement of the General Laws in 1921 was four or five years in preparation and cost the commonwealth about half a million dollars, while the Tercentenary Edition was completed in less than half that time and at an expense of less than half of that sum.

In 1921 and 1922, under the leadership of Hon. B. Loring Young, then Speaker of the House, and following a suggestion of the late James Arnold Lowell, one of the Revision Commissioners and later United States district judge, the plan of continuous consolidation was adopted, by which new general acts as enacted have been fitted in to existing chapters of the General Laws with the hope, as expressed by the Speaker "that never again will a general consolidation and rearrangement of the laws become necessary", but that "at convenient intervals of ten years or thereabouts", the compilation can be reprinted for the convenience of the bench and bar. This purpose was explained by Mr. Young in an article in the MASSACHUSETTS LAW QUARTERLY for February, 1922 (pp. 140–145), and the plan was described as "an important step forward in the mechanics of law making". The plan should not be lost sight of now.

Since the Tercentenary Edition of the General Laws, there are 8 "Blue Books" to be consulted for changes. Beginning with 1941, the Blue Books will be published biennially.

In considering any new edition of the General Laws, the matter of numbering or lettering sections for convenient reference is of great practical importance to bench and bar, as it involves the ready identification of statutes cited in opinions and annotations in the "Annotated Laws of Massachusetts" and other publications, including Shepard's Citations. In Wisconsin, and, perhaps, in some other states, the decimal system of numbering *sections*, in connection with the General Laws, is used instead of our system of lettering new sections. We see no sufficient reason for changing to the decimal system with the risk of breaking the continuing identity of sections.

There have been five general revisions at intervals of about twenty years, beginning with the Revised Statutes of 1836 and followed by the General Statutes of 1860, the Public Statutes of 1882, the Revised Laws of 1902 and the General Laws of 1921. Each of these revisions was an act enacted by the legislature in bulk. The Tercentenary Edition of the General Laws (1932) was not thus enacted, but is a reprint embodying the results of the continuous consolidation described by Mr. Young, and, since it appeared, further original amendments of sections appearing therein have been amendments of the sections "as appearing in the Tercentenary Edition", so that many of the sections, as thus appearing, have been since reenacted in their amended form.

The accumulation of law books and the expense of libraries, both for individuals and the public, have become a major problem of the legal profession which is demanding attention throughout the country, and the purchase of a new edition and index of the statutes involves an additional burden for the bar.

How soon is such an edition needed? With the coming of biennial sessions, we suggest that it is not needed before the close of the session of 1943, and might, perhaps, well be postponed until later.

F. W. G.

THE COMMISSION TO INVESTIGATE THE JUVENILE COURT SYSTEM—THE REPORT OF THE MASSACHUSETTS CHILD COUNCIL ON JUVENILE DELINQUENCY IN MASSACHUSETTS—DISCUSSION OF THE SUGGESTION THAT THE JURISDICTION OF JUVENILE COURTS BE EXTENDED TO COVER "PRE-DELINQUENCY".

In his inaugural address to the legislature, Governor Saltonstall said, "I trust you will consider the operation and extension of our Juvenile Court system". By Resolves of 1939, Chapter 43, the legislature provided for a special commission, consisting of one member of the Senate, three members of the House and three members appointed by the Governor, "For the purpose of making an investigation and study of so much of the Governor's address as relates to the operation and extension of the Juvenile Court system of the Commonwealth, with a view to recommending such changes in said system as it may deem necessary or desirable". The commission is to report on or before the first Wednesday of December, 1940.

The members of the commission are: Hon. John D. MacKay of the Senate (Chairman), Representatives William R. Gilman, Theodore P. Hollis and Thomas J. Harmon, Hon. Thomas H. Connolly of the Brighton District Court, Hon. John F. Perkins of the Boston Juvenile Court and Miss Miranda Prentiss of Boston, the last three members being appointed by the Governor.

Since the appointment of the commission, a report of almost 200 pages on, "Juvenile Delinquency in Massachusetts," has been issued by the "Massachusetts Child Council", a group of persons who have devoted much time and attention to the juvenile problem during the past few years, and whose activities were largely responsible for the appointment of the special commission. This report has attracted much attention in the public press, editorially and otherwise because of the public importance of the problems with which it deals and the suggestions which it contains for the information of the public and the assistance of the special commission, and, presumably, because, on page 10, it is stated that the report "represents the combined thought of 161 men and women" and contains "the results of their searching examination and experienced judgment". The persons referred to are the members of the various "groups" which discussed different aspects of the juvenile problem during the past two or three years. The members of the groups are listed on pages 157–159.

On page 154, it is stated that the report

> "is a record of the discussion of various phases of its problem by groups of people, numbering over one hundred,

> who approached the subject without preconceptions or hobbies, but with a purpose to apply their knowledge and civic interest and to reach conclusions on the basis of their best judgment and common opinion attained after thorough conference".

It must not be assumed, however, that all the members of the "groups" "reached a common opinion" on *all* the suggestions. So far as I am aware, the draft of the report was not submitted to all the members of the various groups before it was issued in print. It is, therefore, a suggestive document based on a central committee's *understanding* of the majority views of the group conferences. The "aim" of the report and of the "group" discussions is described on page XII as an effort to point out

> "Not what it will do, not what it is likely to do, but what a civilized Commonwealth should do, and can do, to reduce delinquency and its fruition into crime."

As such an "effort" it deserves appreciation and study. On page 154, it is stated that:

> "The obstacles in the path of progress are chiefly closed minds and indifference. Perhaps the most serious of these is the conclusion that things are very well as they are."

The hope is expressed that the report "will meet with the frankness and freedom" with which it was prepared. It is in that seriously appreciative spirit that the following comments are submitted.

It is stated on page 18 that:

> "No feature of the problem has been given more extended and thoughtful study by the group than that of giving the court the authority and the equipment to reach and help the so-called 'pre-delinquent child'."

There was a marked disagreement on this subject in the group of which I was a member, on "the legal aspect of delinquency". As no draft of legislation is submitted to extend the jurisdiction of a juvenile court to cover "pre-delinquency" and define the method of invoking the jurisdiction, it is difficult to visualize the exact nature of the proposal, but it is suggested that "the authority to deal with the problems of children in behalf of the state should reach out to the informal treatment" without formal complaint "by no means waiting until there has come about an actionable breach of the law" under the statutes relating to "delinquent" or "wayward" children (See pp. 26–27).

Unless I am mistaken, this means that the probation officers of a juvenile court should be given a sort of roving commission, not only to give helpful advice when requested, but to exercise parental authority of some kind over anybody's children whom they or the

court think needs it. That idea was vigorously objected to by some of us in the group meetings. This opposition is, presumably, referred to briefly on page 28, where it is stated that:

> "Objection to any extension of the Juvenile Court's operation beyond the dealing with duly adjudged delinquents is on the ground that it would be a new intrusion into the home. Those who advance it argue that the place for correction is in the home."

That is true, but the objections of the minority were also based on their judgment as to what Dean Pound referred to somewhere as, "the limits of effective legal action" even in a humanitarian direction.

The report states (page 15) that:

> "The only sound view of delinquency as different from crime is that it is a condition of the child. It is to be ascertained on a full examination of the unwholesome or unfavoring, as well as the favorable, facts as to him".

This comparison of all delinquency with a disease requiring a doctor, or a more intelligent parent, is also common as applied to adult delinquency and crime, but the practical need of the exercise of some form of public authority arises from the fact that juvenile, like adult, misbehavior, in an imperfect world, does not seem susceptible of ideal treatment.

While the juvenile system needs improvement, I am yet to be convinced that the line of progress lies in the extension of the *government* supervision of children (a probable irritant in any case to the individual child) without some form of misbehavior likely to be recognized, both by the child and his or her family, and by the community, as a reasonable starting point for such supervision. Apart from the encroachment on liberty, such extension of *power* seems to me unwise. The supply of individuals to whom *public authority* over "pre-delinquency" should be given must be so small as to be almost nonexistent and, when the problems of public cost and the uncertainties in the variable exercise of irritating *power* by numbers of persons are considered, I think "pre-delinquency" should be left to private effort with such voluntary co-operation and advice as the juvenile court may be able to give without extended *power*.

In addition to this report and the publications referred to in the footnotes, we call the attention of the special commission, and of all persons interested to the little book, "Youth in the Toils," by Harrison and Grant, published by the MacMillan Company in 1938, and also to the fact that the American Law Institute is engaged in a study of the legal problems of juvenile delinquency.*

FRANK W. GRINNELL.

* A. B. A. Journal for June, 1939 pp. 470–471.

MORE ABOUT THE FLAG SALUTE.

EXTRACTS FROM THE OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT IN MINERSVILLE SCHOOL DISTRICT *v.* GOBITIS.

The QUARTERLY for April–June, and for July–September, contained discussions of the requirement of the flag salute, not only as a condition of a child's right to attend the public school, but as a compulsory requirement for violation of which a conscientious child might be sent to a reform school because of religious belief. The opinion was expressed that such a requirement was a violation of the right to religious liberty, and it was suggested that the flag salute statutes and ordinances should be changed to comply with the constitution, and that any conscientious child who was taken from home and placed in a county training school, for such a reason, should be protected by the governor, through his exercise of the pardoning power, in order to avoid making religious martyrs of children. In the first article, the opinion of Judge Maris of the District Court for the Eastern District of Pennsylvania was referred to. He refused to follow the Massachusetts Courts and other courts, and decided that the school authorities in Minersville, Pennsylvania, had no right to exclude a child from school because of a refusal, on religious grounds, to salute the flag. This case of *Minersville School District* v. *Gobitis* was carried to the Circuit Court of Appeals, which unanimously affirmed the decision of Judge Maris in an extended opinion by Circuit Judge Clarke, on November 10th, 1939. Judge Clarke said:

> "Eighteen big states have seen fit to exert their power over a small number of little children . . . The method of exercise has sometimes been by their representatives in solemn conclave assembled and sometimes, as here, by an administrative agency (school board). The matter of exercise is in that field where, above all, or so we had supposed, power must yield to principle. In other words, the area of action is within the aura of conscience . . .
>
> "The appellees, a little girl of thirteen and a little boy of twelve, refused to salute the flag . . . They stood in respectful silence while the other children submitted to the requirement and were dealt with accordingly by being expelled. The reason for their refusal raises the constitutional issue of this appeal. They and their parents are members of a group (we avoid for the present more definite characterization) known as Russellites, or, more colloquially, Earnest Bible Students, and Jehovah's Witnesses.

> The defendant school board admits that this group 'sincerely and honestly believe that the act of saluting a flag contravenes the law of God' in that it constitutes a bowing down to a graven image.
>
> "The so-called flag salute or regulation first appeared in Kansas in 1907. The idea, without benefit of sanctions, seems to have originated with an employee of the magazine, *The Youth's Companion*. It was first put in practice at the National Public School Celebration on October 21, 1892, pamphlet, The Youth's Companion Flag Pledge . . . The voluntary character of the ceremonial act soon disappeared into law and litigation." . . .

Judge Clarke then quotes from the 14th chapter of the volume by Col. Moss entitled, "The Flag of the United States, Its History and Symbolism," as follows:

> "Another form that false patriotism frequently takes is so-called 'Flag-worship'—blind and excessive adulation of the Flag as an emblem or image,—superpunctiliousness and meticulosity in displaying and saluting the Flag—without intelligent and sincere understanding and appreciation of the ideals and institutions it symbolizes. 'This, of course, is but a form of idolatry—a sort of glorified idolatry', so to speak."

The court rules that the free exercise of religion is within the same principle of protection which was recently applied by the Supreme Court of the United States, *in the Hague Case in New Jersey,* to protect the right of free speech and assembly. The court says:

> "Many of the considerations there validated apply here and we need not repeat them. There are others that have even greater cogency. They can be summed up thus. A man may die for the right to express his opinion. He has died or suffered worse than death for the right to worship according to his conscience. That is implicit in the definitions of religion we have cited, in the long history of the struggle for religious liberty before the law, and in the utterances of our statesmen."

After extended quotations on the subject of religion and religious freedom, the opinion concludes as follows:

> "We conclude with two examples from the history of the 'small sects' of Pennsylvania's early days. The state was colonized and founded by William Penn. He came to the new country because his refusal to subordinate religious scruples to educational coercion led to his expulsion from Oxford University in the old. Document by John Aubrey (now in the Bodleian Library).

"George Washington, the almost universal character of whose wisdom always freshly surprises, a century later wrote a letter to the descendants of those whom William Penn brought with him. In it General Washington said:

" 'Government being, among other purposes, instituted to protect the persons and consciences of men from oppression it certainly is the duty of rulers, not only to abstain from it themselves, but according to their stations to prevent it in others.

" 'I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.' Writings of George Washington (Sparks Ed. Vol. 12, pp. 168–169), Letter to the Religious Society Called Quakers, October, 1789.

"The appellant School Board has failed to 'treat the conscientious scruples' of all children with that 'great delicacy and tenderness'. We agree with the father of our country that they should and we concur with the learned District Court in saying that they must.

"The decree of the District Court is affirmed."

While protecting the children the court says in the course of the opinion "One might note that the sect does not appear to practice the tolerance that it now asks for these young members of its flock."

THE ADMINISTRATION OF THE OATH TO WITNESSES.

In 1938, a committee of the Section on Judicial Administration of the American Bar Association, consisting of John H. Wigmore, R. G. Dodge of Boston, and Judges Ernest E. Inglis of Middletown, Merritt E. Otis of Kansas City and Walter E. Treanor of Indianapolis, made a report which contained the following:

"The sense of responsibility impressed by the oath is still (despite certain theological changes) decidedly felt by most persons called as witnesses. Inasmuch as it helps to that extent to stir the conscience and elicit truth, it must be preserved.

"But the degenerate form of its *administration*, as practised today in most courts, is calculated to minimize the effect of the oath. The administration must positively be improved, to obtain maximum efficiency for the oath. The usual spectacle is that of a group of persons, scattered here and there in the courtroom, commanded by the bailiff, 'All witnesses stand

> up and be sworn'; then by the clerk, a gabble 'You smly swear m-m-m-m-. God'; all sit down again (if indeed all had risen), and the busy court routine is resumed."

"To obtain the maximum efficiency of the oath", different members of the committee suggested that "the following features should be restored.

> "(1) It should be administered by the *judge,* not the clerk.
>
> (2) It should be *repeated,* word for word, by the *witness.*
>
> (3) It should be administered *anew* to each witness on coming to the stand, not to a group and in advance.
>
> (4) The judge and all persons in the courtroom should *stand* while the oath is pronounced."

The committee was unanimous in support of number 3, and 34 of the advisory members from different states also supported it. Judge Inglis, Judge Treanor and Mr. Wigmore also supported number 1. Thereafter at the meeting in Cleveland in July, 1938, at which the report was considered, the Section on Judicial Administration approved a recommendation to the bar and the courts of the country:

> "That witnesses should be sworn separately, the oath being administered to each witness as he takes the stand to testify; and that the judge should see that it is administered in a dignified and understandable way, either by himself or by the clerk."
>
> (See A. B. A. Reports, Vol. 63, 118, 517, 520, 526 and A. B. A. Journal for September, 1938.)

In 1926, Massachusetts abolished the requirement of some millions of perfunctory oaths to applications for motor vehicle licenses, income tax returns, etc. Senator Walsh has been leading a movement, which deserves support, in Congress, to follow this example in the Federal system and thus check a habit, which should have been checked long ago, of overworking the name of the Lord for the benefit of nobody except those justices of the peace, or notaries public, who charge the statutory fee for administering oaths.

Is it not time for the courts to take another step toward reviving respect for an oath by adopting the practice recommended of administering the oath to each witness separately, in such a way as to impress the witness, if possible, with its importance as a sanction, instead of a perfunctory group oath?

F. W. G.

THE GIFT OF JUDGE CARROLL'S LIBRARY TO BOSTON COLLEGE LAW SCHOOL.

The personal law library of the late Justice James B. Carroll of the Supreme Judicial Court has been presented by his widow to the Boston College Law School. Announcement of the gift was made recently by Reverend William J. Kenealy, S. J., Dean of the Law School. Judge Carroll's books had been kept at his Springfield home since his death in 1932, in keeping with his desire that the volumes with which he had worked for over fifty years at the bar and on the bench should be preserved intact. The Boston College Law School was selected as the depository of his library because of Judge Carroll's intimate relations with the Jesuit Fathers from the time of his studies at Holy Cross College, from which he was graduated in 1878.

Dean Kenealy also announced that the Carroll Library, consisting of approximately two thousand volumes of law reports, legal treatises and periodicals, will be made the nucleus of a special collection in the Law School's library and will be housed in a new room adjoining the present library. The new room, now in process of construction, is to be called the Carroll Reading Room and a large oil portrait, for which Justice Carroll sat some ten years ago, will be hung in the midst of his books.

In 1911 Governor Eugene N. Foss appointed James B. Carroll as the first Chairman of the Industrial Accident Board of Massachusetts. In 1912 his Alma Mater, Holy Cross College, made him an honorary Doctor of Laws. In 1914 Governor David I. Walsh appointed him a Justice of the Superior Court, and in the following year he elevated him to the Supreme Judicial Court. He was one of the most eminent Catholic laymen in Massachusetts, an ardent worker in the St. Vincent de Paul Society, and was made a Papal Knight of Saint Gregory in 1925.

At the time of his death, Chief Justice Rugg paid this touching tribute to his departed friend and colleague: "My emotions are so deeply stirred that I can give no adequate estimate of the public service and judicial achievements of Judge Carroll. He has been on the bench of the Supreme Judicial Court almost exactly 17 years. His mark has been of very high excellence. He brought to the deliberations of the court wide experience in practical affairs, intimate knowledge of human nature, and the mind of a scholar. As the first Chairman of the Industrial Accident Board he had a large part in shaping wisely the initial operations of the Workmen's Compensation Act. His religious convictions were deep and steadfast; he was a man of indescribable personal charm; a faithful, learned and wise servant of the Commonwealth."

RESIGNATION FROM THE BAR—A SUGGESTION AS TO PRACTICE FOR THE SUPREME JUDICIAL COURT AND THE SUPERIOR COURT.

Resignations from the bar have been accepted from time to time during the past twenty years, in different counties in both the Supreme Judicial and the Superior courts. There is nothing new about either the idea of resignation from the bar, or its application in practice, either in Massachusetts or elsewhere. In Wisconsin, it appears to be the common practice to accept resignations of men, whether under fire or not, as shown by the notes on page 42 of the Bulletin of the Wisconsin Bar Association for January, 1934, where cases are reported in which "the usual order was issued striking the name from the list of attorneys 'for due cause'." And yet, judges, in both the Supreme Judicial and the Superior courts, when accepting a resignation, are apt to add some cautious remark that it is not to be regarded "as a precedent", and, on several occasions when the question has arisen, we have received inquiries either by letter or telephone from some lawyer connected with a case for the information of the court, as if it were a peculiar, or unusual, proceeding.

While we are perfectly willing to answer such inquiries, we find it difficult to understand why so much inquiry is considered necessary about what seems so simple a matter. We respectfully suggest that, instead of making cautious remarks about not setting a precedent (which has already been set so far as the discretionary practice is concerned) when a resignation is accepted, the courts should take the step that is really needed in practice, by adopting a fair and reasonable form of order similar to that used in Wisconsin for the acceptance of a resignation and the consequent removal from the bar. Such an order should put any body, whether a Massachusetts court, or a court of another state, on inquiry in case of future application for admission.

If a man is ready to resign and save the court and everybody else the burden of a hearing and avoid publicity, why should not the resignation be accepted and an effective order of exclusion made? What useful purpose is served by insisting on publicity of charges and thus making it more difficult for a man to resign? Persons are allowed to resign from practically all other positions in public, or in private, service whether or not they are under fire. Judges resign under such circumstances and the public welfare is thus served. The recent case of Judge Manton in New York is an

illustration. During the Tweed regime, forced resignation was one method adopted to get some of the Tweed judges off the bench.*

If facts are found they could be impounded, to be inquired into in future only by leave of court, without being spread upon the *public* records. If no complaint has been filed or spread on the public records, a memorandum of the allegations, *or information,* could be similarly filed and impounded with such depositions or other evidence as the court deemed advisable. Such a practice would seem a greater protection to the public against the results of the *uninformed* action of a good-natured judge in the future than a formal order of disbarment on the least serious of several charges. That the acceptance of an unqualified resignation is subject to the approval of the court is true, as a court order is needed to strike from the bar an attorney who has been admitted by court order. While there are sometimes cases of so notorious a character that disbarment, without resignation, may be more in the public interest, in most cases an order striking the name from the bar "for due cause", after the acceptance of a resignation, and with such impounded memorandum of findings, or such other information, as may seem advisable and fair, would seem to be the most effective protection of the public. Sensational publicity does not seem in the interest either of the bar or of the public. We understand that disciplinary matters are handled without a public hearing in the Federal courts in this district unless the lawyer involved requests a public hearing.

F. W. G.

* (See the account by Mr. Sheldon of the early history of the Bar Association of the City of New York in the QUARTERLY for August, 1920, at p. 374.)

THE GRADUAL CHARACTER OF LEGAL PROGRESS.

"I am no iconoclast," wrote Mr. Claude Mullins*, "and have not set out in the spirit of the critic who wrote to Lord Chancellor Westbury about our 'law-gean stables.' Every year of my professional life has added to my respect for our judges and for the fundamental spirit in which justice is administered in this country. To become convinced of defects in that administration is not by any means to lose faith in its merits.

"This needs to be emphasized, because lawyers . . . are, as a rule, very conservative in matters relating to their own calling, and are apt to ignore, or even resent, suggestions...

* Preface to *In Quest of Justice*, a critical study of the English legal system, published in 1931.

> Today agitation for change and a disrespect for existing institutions are prominent features in our public life, and I am anxious to assure those who read this book that it is not the product of any lack of appreciation for the greatness of our legal traditions. But it is well to remember that such men as Mansfield, Brougham, Romilly, Campbell and Stephen, loved English law at least as much as Coke, Eldon or Blackstone. As this book will show, the great legal reforms of the past were usually the work of a few progressive men who carried them through, either with little help from the profession generally or in the face of strong professional opposition.
>
> "Sincerely though I believe that there is today a reawakening public interest in the improvement of our courts of law, I recognise that years of study and discussion will be necessary before any of the present defects in our legal procedure are likely to be remedied. Lord John Russell once said that thirty years was the usual period of gestation for any measure of law reform. Those who think out practical proposals for reform should bear in mind the patience that has been demanded from the heroes of our law who have fathered the great legal reforms of the past. Brougham had to wait seventeen years before his proposals to establish our modern system of County Courts reached the statute book and twenty-three years before he could secure the passage of his scheme to admit the evidence of parties in their own litigation. The Indian Penal Code was drafted in 1837, but did not become law until 1860. In 1870 the House of Commons approved the principle that in criminal trials the accused and their wives or husbands should be allowed to give evidence on oath, but this change in the law was not made until 1898; Lord Halsbury carried the Bill through the House of Lords five times before it finally became law. We may hope that the changes now needed will come more easily and rapidly, but law reformers must be prepared for history to repeat itself."

In 1926, Professor Sunderland, in an article on the "Hundred Years' War for Legal Reform in England," printed in the MASSACHUSETTS LAW QUARTERLY for November, 1926, brought out the fact that the war was carried on largely by laymen. While things move somewhat more rapidly in this century, the *gradual* development of public and professional sentiment was illustrated by the opening of Dean Pound's address on, "The Work of a Judicial Council," at this year's meeting of the Texas Bar Association. He began as follows:

> "General Grant, in his memoirs, says of General Scott that he habitually drew his reports in the third person, which had the advantage that it enabled him to bestow praise upon that third person.

"I confess I feel a little like addressing you in the third person this morning. Just thirty years ago I drew up a report for the American Bar Association in which I suggested that we might take some steps toward the organization of courts on a more modern system; that we might confer the rule-making power upon the courts, or rather restore it where it belonged originally, and that we might perhaps be moving toward an organization of the profession.

"The committee struck out two of those three things, but they were willing to let me make a separate report over my own name, and pinned it to their report, in which I advocated restoring the rule-making power to the courts.

"And after thirty years the rule-making power of the court is generally being restored throughout the land; and organization of the profession, that I was not even allowed to suggest over my own name, has made very great progress, as you know, and it is no longer necessary to relegate to an appendix a suggestion as to the organization of the courts. So I feel tempted to make a report to you in the third person."

DISCUSSION OF SUGGESTED SERVICE OF PROCESS BY REGISTERED MAIL.

The current discussion in the press about the office of sheriff in Suffolk County has revived the suggestion* that service of process in civil cases by registered mail should be allowed by statute, or by rule of court, as an optional alternative to service, by a sheriff or constable, in hand, or, by leaving a copy at the "last and usual place of abode" of the defendant.

The subject was discussed, without recommendation, in the 9th Report of the Judicial Council (pp. 55–56).

The Civil Judicial Council of Texas recommended registered mail service in its 4th Report (pp. 9–11).

The 3rd Report of the New York Judicial Council contained a discussion without recommendation (p. 281).

In Michigan, the court adopted, as a regulation of practice and procedure, the following:

> RULE 16. SERVICE OF SUMMONS BY REGISTERED MAIL. Service of summons in any case, with or without a copy of the declaration or bill of complaint, or of a copy of the declaration and notice to plead in actions commenced by declaration, may be made by the sheriff in the proper county by

* See the *Bar Bulletin* for December, 1939 (pp. 15–16), and the circular of the Boston Municipal Research Bureau for December 11, 1939.

> registered mail, deliverable to the addressee only, upon residents of the state. The official return receipt of the United States post office department purporting to be signed by the defendant, together with the affidavit of one having personal knowledge of the handwriting of the defendant, that such signature is the defendant's signature, together with the certificate of the sheriff or deputy based on personal knowledge that the package for which such receipt was given contained a true copy of the original summons or other papers sought to be so served, shall constitute prima facie evidence of personal service.

We understand that this rule has not been used very much. The provision that it be deliverable to the addressee only, makes it difficult to get the summons delivered to a person who is trying to avoid service and it was really for that purpose that the rule was devised.

The purpose of most of the suggestions is to reduce the expense to litigants and to reduce also the practical injustices, with which the bar is familiar, which are apt to result from the practice of service by leaving a summons at "the last and usual place of abode" under conditions which may not infrequently result in its not being received by the defendant, so that a default may follow without notice.

In the small claims division, the claim is filed, like a bill in equity, before notice is sent by the clerk. In the Boston Municipal Court, we are informed that from January 1, 1929 to September 30, 1939, 13,119 notices of small claims actions were sent by the clerk by registered mail, of which only 19 were not accepted by the defendant, and in only 638 cases (or .049%) were they "unable to locate" the defendant. We are informed that in the last eleven years, to the knowledge of the clerk of the Small Claims Division, there have not been more than six complaints of defendants that they had no notice of actions pending or entered.

In the District Courts outside of the Central Boston Court, the volume of small claims has risen to about 38,000 cases during the year ending September 30th, 1939, in all of which the notices are by registered mail. It has been used for a long time in Probate Courts and in the Land Court. It is an essential part of the service of process on a non-resident motorist and is the only form of notice that he may actually get of a damage suit under G. L. c. 90 § 3C, although the statute creates the fiction that service on the register of motor vehicles, as attorney, is personal service accepted as such by the fact of driving in Massachusetts.*

* See *Hess* v. *Pawloski*, 274 U. S. 352, 250 Mass. 22.

In the district courts, other than the Boston Court, we understand that there has been some increase in the number of refusals to receive a registered mail notice from the clerk with the result that the court has required service by an officer. The Texas Civil Judicial Councils in its draft act proposed to meet this difficulty by providing that "The clerk may be required by the plaintiff, his agent or attorney, to give his residence or post office box address and not his official title or address, upon the envelope." When the thousands of notices issued are considered the number refused must be relatively small in any event. Several tentative drafts of an act have been called to our attention. If the experiment of an optional alternative should be tried, the best plan would seem to be to follow the small claims practice by requiring the declaration to be filed and to have the process sent by the clerk, if mail service is desired. The Texas proviso might be inserted also.

As to the authority of the courts to try the experiment by rule, without legislation, the Michigan rule, above quoted, is suggestive. In the matter of notices the court has said "if notice actually had been received seasonably, it well might be that the particular method of service would be a matter of indifference." *

If the courts, today, are authorized, as they are, in cases against non-resident motorists to recognize the fiction of a service on the register of motor vehicles and to rely, for actual notice, on the requirement of registered mail, and to recognize as actual the service at the "last and usual place of abode" which may also be a fiction, so far as actual notice is concerned,** it would seem that, under the broad language of G. L. ch. 213 § 3 and chapter 218 §§ 43 and 50, the various courts have the same recognized power which the Michigan court exercised, to authorize service by mail under reasonable safeguards, *if it seems advisable.* An experiment by rule in one or more of the courts might be the best test, as it could be abandoned, or changed, readily. It could be provided that if the defendant did not appear in answer to service by mail no default should be entered except on motion and after such further service as the court ordered, if further service was necessary.***

F. W. G.

* *Bradley* v. *B'd of Zoning Adjustment,* 255 Mass. at p. 172.

** 255 Mass. at p. 172.

*** It has also been suggested that the New York practice of service by private citizens might be adopted here as an alternative method. The "Literary Digest" for January, 1940, contains a condensed account from the "New Yorker" of a process serving corporation with good actors as "servers".

A SIDE LIGHT ON SAMUEL WARREN, AUTHOR OF "TEN THOUSAND A YEAR", WITH REFERENCE TO NOVELS ABOUT LAW AND LAWYERS.

The following passage appears in Sir Francis Hastings Doyle's *Reminiscences and Opinions* (published in 1886), pages 234–236.

"After having been called to the bar (about 1836), I joined the Northern Circuit. As the chief advantage I gained from that proceeding was the acquaintanceship of other interesting men, I shall begin with the one in whose company I travelled down to York for my first circuit. This was Sam Warren. He had by that time acquired a considerable reputation, and had no doubt at all that he was going to do great things, to occupy the Woolsack, after leading the House of Commons, and generally dazzling mankind. His 'Diary of a Late Physician' produced a great effect, partly, I think, under the mistaken impression that it had been bequeathed to the world by a real practising physician, and therefore dealt with interesting facts, and not only with amusing fancies. But partly also because, though somewhat rough, if not coarse in texture, it gave evidence of talent, and was reasonably held to be a work of promise. Sam was a very good fellow and a capital talker, but he had unfortunately been bred up in small dissenting schools, where he found nobody able to make him gallop. He therefore fancied himself a sort of St. Simon (the modern Eclipse I mean, not that inferior person the French memoir writer), and these opinions of his being scarcely accepted by other members of the circuit, placed him now and then in a false position. The very first day of his appearance at mess he had been laying down the law at the lower end of the table with his ordinary emphasis. During this process, David Dundas, sitting much higher up, got into a dispute with an ancient waiter, who had accustomed himself to bully the barristers from generation to generation, and called him 'an old coxcomb'. Warren's ear caught the substantive, and he being filled with an idea that the leaders of the circuit were watching his Avatar with jealous apprehension, thought the expression aimed at him, and intended as a deliberate insult. Accordingly, after dinner, before Dundas had half got through his first brief, he received a visit from a stuttering satellite of Warren's, demanding satisfaction. Dundas stared, and on learning the nature of the supposed offence, simply replied: 'Sir, all I have to say is that Mr. Warren's image never crossed my mind during the whole of the day.' 'Th-th-then, sir,' retorted the stammering belligerent, 'i-i-if you did not mean Mr. Warren, d-d-did you mean me?' 'You, sir,' was the answer; 'if you will forgive me for saying so, I did not know that *you* were *in rerum naturâ*.' This foolish and restless vanity on Warren's part naturally created some irritation. He then chose to imagine that a conspiracy had been formed to prevent his matchless talents from having fair play, and thereupon complained to Murphy, a brilliant and careless Irishman, of his secret enemies. All the consolation he got amounted to this: 'Enemies, God bless my soul, you've no enemies but yourself, and you would not be half a bad fellow if you were not such a damned vapouring jackass.' These lessons, I may add, were not thrown

away upon Warren; he sobered down by degrees, and being clever, pleasant, and good-humoured, grew in popularity, but though generally liked, he was not much employed by the Yorkshire attorneys. When employed, though he got through his work reasonably well, he failed to impress his hearers either as a remarkable advocate or a profound lawyer, and was, I think, fortunate in obtaining a Lunacy Commissionership. This gave him a good income and a respectable position, thereby enabling him to cultivate literature in his leisure moments." *

The pictures of the firm of Quirk, Gammon & Snap and of their well-known client Tittlebat Titmouse, who appear in Warren's novel, "Ten Thousand a Year," are reproduced in the QUARTERLY for August, 1922 (pp. 10–11) together with some of Mr. J. B. Atlay's constant references to Warren's novel as an accurate source of legal history. Those who are interested in legal history will notice the growing appreciation by legal historians of the value of leading novels as sources. Dean Wigmore pointed this out in his article on "One Hundred Legal Novels,"** as did Judge Gest in "The Lawyer in Literature". Sir William Holdsworth devoted the whole of a small volume to, "Dickens As A Legal Historian," and in the QUARTERLY for July–September, 1939, we referred to a recent article in the *Journal of Criminal Law and Criminology* for July–August, 1938, on, "Dickens As a Criminologist". As Wigmore said, "The living side of the rules of law is often to be found in fiction alone."

F. W. G.

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* Another entertaining story of Warren's absurdities appears in the *Reminiscences of Sir Frederick Pollock*, Vol. I (pp. 21–22), (published in 1887).

** Illinois Law Rev. for April, 1908, reprinted by permission in MASSACHUSETTS LAW QUARTERLY for May, 1922.